77-1679

IN THE

Supreme Court of the United States

October Term, 1977

THE ESTATE OF THOMAS A. WILSON, EUGENE R. SPEER and THE UNION NATIONAL BANK OF PITTSBURGH, EXECUTORS,

Petitioners

v.

AIKEN INDUSTRIES, INC.,

Respondent

Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

RALPH H. GERMAN
WILLIAM S. SMITH
COOPER, GERMAN, KELLY & SMITH
2232 Oliver Building
Pittsburgh, Pennsylvania 15222

Attorneys for Petitioner

May, 1978

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

INDEX

TABLE OF CITATIONS

UNITED STATES CONSTITUTION

CASES

STATUTES

IN THE

Supreme Court of the United States

October Term, 1977

THE ESTATE OF THOMAS A. WILSON,
EUGENE R. SPEER and THE UNION
NATIONAL BANK OF PITTSBURGH,
EXECUTORS,
Petitioners

v.

AIKEN INDUSTRIES, INC.,
Respondent

Petition For A Writ Of Certiorari
To The Supreme Court Of Pennsylvania

Petitioners, The Estate of Thomas A. Wilson, and The Union National Bank of Pittsburgh, respectfully pray that a writ of certiorari issue to review the order and opinions of the Supreme Court of Pennsylvania, entered in this proceeding on January 31, 1978 and February 1, 1978 (Application for Reargument denied April 11, 1978).

OPINIONS BELOW

There are five opinions of the Supreme Court of Pennsylvania, which have been reported at 383 A.2d 808. The opinion in Support of Affirmance and Modification by Pomeroy, J. (joined in by Eagen, C.J. and O'Brien, J.) is reproduced in Appendix A to this Petition at page 1a. The Opinion in Support of Reversal by Manderino, J. is reproduced in Appendix A to this Petition at page 13a. The Opinion in Support of Reversal by Nix, J. is reproduced in Appendix A to this Petition at page 22a. The Opinion in Support of Reversal by Roberts, J. is reproduced in Appendix A to this Petition at page 24a. Finally, the Per Curiam Opinion (as amended on February 2, 1978) is reproduced in Appendix A to this Petition at page 25a.

JURISDICTION

The Order of the Supreme Court of Pennsylvania was entered on February 1, 1978. A timely Application for Reargument was denied April 11, 1978. The jurisdiction of this Court is invoked under 28 USC §1257(3).

QUESTION PRESENTED FOR REVIEW

Is there a denial of due process when an appellate court affirms the judgment of the lower court, despite the fact that each of the justices of that appellate court holds that the judgment of the lower court should be reversed or should be vacated?

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States which provides in salient part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Section 1)

STATEMENT OF THE CASE

The question involved in this Petition arises out of a suit for damages for the alleged breach of a non-competition covenant by one Thomas A. Wilson, who died during the pendency of the suit. The trial court found liability and awarded damages in the amount of $193,576.75.

The Estate of Thomas A. Wilson appealed the lower court decision both as to liability and as to damages. Six Justices of the Pennsylvania Supreme Court participated in the decision of the appeal. Three Justices agreed with the Estate that there was no liability. Three Justices affirmed the liability portion of the lower court decision, but agreed with the Estate that the lower court had applied an improper measure of damages. Thus, every Justice agreed that the lower court was wrong but incomprehensibly the Per Curiam Opinion and Order affirmed the decree of the lower court.

No federal questions were raised during the state court proceedings since the denial of due process occurred in the order of the state appellate court. Petitioners in their Application for Reargument contended that the variance between the Opinions and the Order constituted a patent miscarriage of justice.

REASONS FOR GRANTING THE WRIT

Petitioners contend that the Supreme Court of Pennsylvania has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's review.

To affirm a lower court award when each appellate justice finds that the award is erroneous or defective is arbitrary, irresponsible and confiscatory judicial action. Petitioners find themselves in the intolerable position of having to pay a quarter of a million dollars (including interest and costs) when all of the appellate justices held that they owe nothing at all or substantially less. It would be difficult to postulate a more flagrant instance of deprivation of property without due process of law.

It is submitted that this Petition meets the criteria of this Court in determining whether or not state judicial action violates federal constitutional rights:

1. The error is "gross and obvious, coming close to the boundary of arbitrary action." It is an "absolute disregard" of the rights of a property owner. It ignores "plain rights" and constitutes substantial unfairness or partiality in judicial proceedings. *Roberts v. New York,* 295 U.S. 264, 277, 278 (1934).

2. The mistake is "so gross as to be impossible in a rational administration of justice." *Chicago L. Ins. Co. v. Cherry,* 244 U.S. 25 (1917).

3. The order "amounts to mere arbitrary or capricious exercise of power." *American Ry. Express Co. v. Kentucky,* 273 U.S. 269, 273 (1925).

4. The order is "so plainly arbitrary and contrary to law" as to be an act "of mere spoliation." *Corrigan v. Buckley,* 271 U.S. 323, 331, 332 (1926).

For an appellate court to hand down an order affirming a lower court judgment which all of its justices have held to be erroneous beggars description. But it is not overstatement to characterize this as an absolute disregard of the rights of Petitioners or as a gross mistake impossible in a rational administration of justice or as arbitrary, capricious and an act of mere spoliation.

Obviously, this Court must be highly selective in exercising its constitutional prerogative to review state court decisions. However, this Court is the ultimate guarantor of constitutional rights and it should elect to review this decision which is arbitrary and shocking to one's sense of fair play. This is not a minor error, nor even a substantial error, but a patent and flagrant miscarriage of justice.

Respectfully submitted,

RALPH H. GERMAN
WILLIAM S. SMITH
COOPER, GERMAN, KELLY & SMITH
2232 Oliver Building
Pittsburgh, Pennsylvania 15222
Attorneys for Petitioners

May, 1978

APPENDIX A

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 79 March Term, 1974

AIKEN INDUSTRIES, INC., Appellee
v.
THE ESTATE OF THOMAS A. WILSON, EUGENE R. SPEER and THE UNION NATIONAL BANK OF PITTSBURGH, Executors, Appellants

Appeal from the Decree Nisi of July 12, 1973, made final by Order of Court of January 4, 1974, and Judgment of January 10, 1974, of the Court of Common Pleas, Civil Division, of Allegheny County, at No. 1246 January Term, 1971

Opinion in Support of Affirmance and Modification

POMEROY, J.

FILED: January 31, 1978

Thomas A. Wilson was the sole shareholder of National Carbide Die Company (National). In 1967, in a tax-free transaction, Wilson caused all the assets of National to be sold to Aiken Industries, Inc. (Aiken) in exchange for $2,000,000 worth of Aiken stock. One of the terms of the sales transaction was that Mr. Wilson would be employed by Aiken and that while so employed would refrain from competition with National. In this

action for damages,[1] Aiken alleges a breach of that covenant as well as a breach of a fiduciary duty Wilson owed to Aiken.[2] The chancellor, upheld by a court en banc, found that Wilson did violate both his contractual and fiduciary duties and awarded damages. This is an appeal by the executors of Wilson's estate in which it is asserted that: (1) there was no evidence of breach of the non-competition agreement; (2) Wilson's actions were not in violation of his fiduciary duty; and (3) the measure of damages was improper.[3]

1. *Breach of Covenant Not to Compete.*

As an initial matter, it is to be observed that the function of this Court on an appeal from an adjudication in equity is not to substitute its view for that of

---

1. As originally filed, the action also sought injunctive relief against continuing competitive activity by Wilson. During the pendency of the action Wilson died, and the executors of his estate were substituted as defendants. Thereafter the claim for injunctive relief was withdrawn.

2. One aspect of the agreements between the parties was that Wilson was to become an executive of Aiken for a term of five-years. Upon consummation of the transaction Wilson did become a director of Aiken and President of National, which was made a division of Aiken. The alleged breach of fiduciary duty pertains to Wilson's status as an officer and director of Aiken. For the reasons discussed *infra,* n.8, n.9 and accompanying text, we need not reach the propriety of the chancellor's finding that the fiduciary duty was breached.

3. This appeal was brought in this Court pursuant to the Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P.L. 673, No. 223, 17 P.S. §211.202(4). Since the filing of this appeal, that section of the Act has been suspended absolutely by Rule 5105(a) of the Rules of Appellate Procedure, effective July 1, 1976. Appeals in equity are now governed by Pa. R.A.P. 702(b).

the lower court; our task is rather to determine whether "a judicial mind, on due consideration of all the evidence, as a whole, could reasonably have reached the conclusion of the chancellor." *Masciantonio Will,* 392 Pa. 362, 367, 141 A.2d 362, 365 (1968). See also *Yuhas v. Schmidt,* 434 Pa. 447, 258 A.2d 616 (1969). A chancellor's findings of fact, approved by a court en banc, have all the force and effect of a jury's verdict if they are supported by adequate evidence and ordinarily will not be disturbed on appeal. *Jacobson & Co. v. International Environmental Corp.,* 427 Pa. 439, 235 A.2d 612 (1967).

With this standard of review in mind, we have carefully reviewed the record and find substantial evidence to support the chancellor's findings. He found that subsequent to Aiken's acquisition of National, Wilson engaged in the following activities: (1) made outright gifts of $60,000 to two of his former employees with full knowledge that this money would be used by them as initial capital for a company known as Compacting Tools, Inc. (Compacting), a company which the donees were then forming and which was organized to engage in direct competition with National; (2) rented to the same two former employees (the now owners and managers of Compacting) the building in which Compacting carried on its activities; (3) waived rent on the premises leased to Compacting for the first seven months of the lease because of the tight money situation at Compacting; (4) made two automobiles available to the former employees, both of whom used those vehicles in connection with the new business; (5) donated furniture and office equipment for use in the offices of Compacting; and (6) executed a waiver of his security interest (a landlord's lien) in Compacting's machinery

located on the premises, thus enabling Compacting to negotiate a loan of $160,000 which it required to purchase necessary equipment. These findings properly led to the chancellor's conclusion that Wilson had engaged in activities in connection with the "ownership, management, operation or control" of a competitor in direct violation of the express language of the contract.[4]

The appellants urge that Mr. Wilson did no more than engage in harmless acts of beneficence. We think, however, that the breach of a restrictive covenant such as the one here involved[5] does not depend upon a finding of specific intent to harm; the covenant is breached if the covenator knowingly engages in activity the necessary effect of which will be to foster, if not institgate, competition. Assuming that Mr. Wilson was indeed motivated solely by benevolence towards his two close

4. As indicated above, the contract of employment was part of the overall transaction between Wilson and Aiken. It contained the following comment:

> "Wilson recognizes that National is, and will in the future be, engaged in highly competitive businesses. During the employment period, and for any subsequent period of employment by Aiken, Wilson agrees that he will not, directly or indirectly, own, manage, operate, control, be employed by, participate in, or be connected in any manner, with the ownership, management, operation, or control of any business competitive with the business of National. . . ." (Record, at p. 654a).

5. Because the action for injunctive relief was withdrawn following the death of Wilson, see n.1, *supra,* we need not be concerned with the reasonableness of the terms of covenant. See *Krauss v. M. L. Claster & Sons, Inc.,* 434 Pa. 403, 407, 254 A.2d 1, 3 (1969); *Gresh v. Potter McCune Co.,* 235 Pa.Super. 537, 344 A.2d 540 (1975).

friends and former associates, it was incumbent upon him to give expression to that generosity in a manner consistent with the contractual duty he had but recently assumed with respect to Aiken.

2. *The Measure of Damages.*

With respect to the issue of damages, the chancellor awarded appellee $196,576.75. The appellants challenge this sum as being both speculative and improperly calculated.

At trial, Aiken presented convincing evidence to the effect that National's sales to 25 particular customers constituted 50% of its business in 1970 whereas after the incorporation of Compacting and the ensuing competitive activities of that company during the years in question, 1970 through 1972, National's sales to these same 25 customers declined by one-half, or by approximately $700,000. During this same period, Compacting had sales of $694,000, some 95% of which was attributable to the business of these same 25 customers who correspondingly decreased their orders to National. Aiken presented evidence showing the National Division's "marginal income percentage"[6] during the period 1970

6. The trial record, the opinions of the trial court and the briefs of the parties all use the expression "marginal income percentage". The term is used loosely to describe an accounting procedure whereby profit may be determined by calculating pre-tax income generated by increased sales within a certain dollar range of sales. The profit is calculated by taking total sales (number of units x sales price per unit) and subtracting variable costs (costs which increase as production increases, such as cost of materials, direct labor, etc.) to arrive at "marginal income." From marginal income is subtracted fixed costs (costs remaining static regardless of volume of production, e.g., rent, fixed sales costs, etc.) to arrive

through 1972 to be 44% and, applying this percentage to its $700,000 lost sales arrived at a figure of $308,000 as lost profits. The chancellor reduced the lost sales total to $400,000 to take into account factors in the record which he found to be not directly attributable to the competition of Compacting (market recession, a strike in the automobile industry, etc.). He also found that 33⅓% was a more realistic "marginal income percentage" than 44%. Having made these adjustments, the chancellor determined that the lost profits suffered by National and attributable to the competition of Compacting were $133,330.

The appellants challenge the chancellor's calculation of $400,000 representing lost sales as "speculative." We recognize, however, that the breach of non-competition agreements of the type with which we are here concerned necessarily involves damages which are difficult to calculate with absolute precision. See *Ross v. Houck,* 184 Pa.Super. 448, 136 A.2d 160 (1957). The indefiniteness consequent upon this difficulty does not, however, by itself preclude relief. In *Massachusetts Bonding & Ins. Co. v. Johnstone & Harden, Inc.,* 343 Pa. 270, 278-80, 22 A.2d 709, 714 (1941), this Court stated:

> "... In Osterling v. Frick, et al., Executors, 284 Pa. 397, 131 A. 250, this court held [second syllabus]: 'While damages cannot be based on a mere guess or speculation, yet where the amount may be fairly estimated from the evidence, a recovery will

---

at a profit figure for a particular volume of sales. The profit "percentage" is that percentage of total sales income remaining after deduction of fixed and variable costs. As sales increase, fixed costs per unit decrease and manufacturing profit increases.

be sustained even though such amount cannot be determined with entire accuracy'.

* * *

"Williston on Contracts, Revised Edition, Vol. 5, lays down these principles in respect to measuring damages: Section 1345, p. 3776, 'Though any breach of contract entitles the injured party at least to nominal damages, he cannot recover more without establishing a basis for an inference of fact that he has been actually damaged. A mere possibility that the plaintiff might have made a profit if the defendant had kept his contract will not justify damages based on the assumption that the profit would have been made. But though there must be evidence of substantial damage in order to justify recovery of more than a nominal sum, the exact amount need not be shown. Where substantial damage has been suffered, the impossibility of proving its precise limits is no reason for denying substantial damages altogether.'

* * *

"The essence of the legal principles above cited is that compensation for breach of contract cannot be justly refused because proof of the exact amount of loss is not produced, for there is judicial recognition of the difficulty or even impossibility of the production of such proof. What the law does require in cases of this character is that the evidence shall with a fair degree of probability establish a basis for the assessment of damages."

See also *Solar Electric Corporation v. Exterminator Corporation of America,* 384 Pa. 233, 120 A.2d 533 (1956); *Lambert v. Durallium Products Corporation,* 364 Pa.

284, 72 A.2d 66 (1950); *Hahn v. Andrews,* 182 Pa. Super. 338, 126 A.2d 519 (1956). We believe that appellee Aiken presented evidence enough to prove that it had suffered substantial damages and that the amount of $400,000 determined by the chancellor to represent sales lost because of the breach of contract does "with a fair degree of probability establish a basis for the assessment of damages." *Massachusetts Bonding, supra.* The contrary standard urged by appellants would encourage the violation of contracts with impunity, the breaching party resting secure in the knowledge that the injured party would be unable to prove damages with the nice precision which appellant would require. Cf. *Weinglass v. Gibson,* 304 Pa. 203, 155 A.2d 439 (1931).

We do, however, agree with appellants that the chancellor erred in determining what percentage of these lost sales would have constituted profit to Aiken. Lost profits are the "net pecuniary gain from a transaction, the gross pecuniary gain diminished by the cost of obtaining them." Restatement of Contracts, § 331, Comment (b). See also 22 Am. Jur. 2d Damages, § 178, p. 253 and cases cited. The "marginal income percentage" procedure, *see* n.6, *supra,* when properly applied, can result in an accurate estimate of lost net profits. In the present case, however, the profit margin of 44% claimed by appellee failed to take into account costs normally incurred

by appellee before arriving at a valid net profit figure.[7] Although the chancellor did reduce this figure to 33⅓%, how he arrived at this percentage nowhere appears. As we stated in *Solar Electric Corporation v. Exterminator Corp., supra:*

---

7. Aiken presented the following statistical analysis in support of its claimed "marginal income percentage" of 44%:

STATEMENT OF EARNINGS
NATIONAL CARBIDE DIE DIVISION OF
AIKEN INDUSTRIES, INC.

1968	1969	1970	1971	11 Months 1972
		Net Shipments		
1,368,801	1,791,820	1,683,482	1,318,497	1,549,407
		Variable Costs		
683,178	866,059	981,924	736,877	822,540
		%		
49.9	48.3	58.3	55.9	53.1
		Margin		
685,623	925,761	701,558	581,620	726,867
		%		
50.1	51.7	41.7	44.1	46.9

(Plaintiff's Damage Exhibit 12g. Record at 1028a.)

It is, however, clear that this information established only that percentage of total sales income remaining after deduction of variable costs. To establish a *net* profit, it is necessary also to deduct other fixed costs. *See* n.6, *supra.* That these figures failed to establish a net profit is evident from the testimony of Aiken's Division Controller, Mr. Robert Zimmerman. Referring to the above exhibit, Mr. Zimmerman stated: "It does not show net earnings. It only indicates marginal earnings where other costs are generally deducted after that before you arrive at taxable income." (Record at 924a.)

> "It is true that where there is a basis in the evidence for a reasonable computation of the damages suffered, considering the nature of the transaction, a verdict may be based thereon, though there may be involved some uncertainty about it; Weinglass v. Gibson, 304 Pa. 203 (1931); *nevertheless, where damages are susceptible of being proved the amount must be established with certainty:* Forrest v. Buchanan, 203 Pa. 454 (1902)." 384 Pa. at 235, 120 A.2d at 534 (emphasis added).

We think that the chancellor should have determined, with some degree of specificity, what the net profit percentage, *see* n.6, *supra,* would have been for the years 1970 through 1972 had National's sales volumes for those years included sales lost due to the competition of Compacting. That percentage would then be applied to the lost sales total (found by the chancellor to be $400,000) in order to arrive at a lost profit figure for the period in question.

Appellants next challenge the award of $35,000 for the training of National employees to replace those who defected to Compacting. Aiken presented evidence to the effect that all eight of the employees who went to Compacting were skilled machine operators possessing two or more years experience; that these eight employees constituted 100% of Compacting's work force; and that National normally experienced no turnover of skilled employees who had two or more years experience. Aiken also presented evidence that training of replacement personnel would cost $100,000, a figure which the chancellor, based on evidence in the record, reduced to $35,000. An award of damages based upon the cost of training these new employees was proper and we find

nothing so shocking in the amount of the award for this item as to require a modification of the chancellor's findings. *James v. Ferguson,* 401 Pa. 92, 162 A.2d 690 (1960). Furthermore, appellants presented no evidence to contradict the estimate of the cost of training. Our observation in *Lobozzo v. Eidemiller, Inc.,* 437 Pa. 360, 263 A.2d 432 (1970) is applicable here:

> "With regard to the second issue, the amount of the damages, the only testimony introduced was by Lobozzo's witnesses who gave estimates of the cost of repairs. While these estimates may have been somewhat high, Eidemiller introduced no testimony indicating a lower repair cost. We cannot say that the jury was in error in accepting the only evidence presented to them on the amount of damages." 437 Pa. at 368, 263 A.2d at 436-37.

Finally, because of Mr. Wilson's breach of his fiduciary duty to Aiken, the chancellor awarded $25,000 constituting the salary paid to Wilson during the period of Compacting's competition.[8] We believe that such a finding and award were unnecessary to the disposition of the present case. Aiken has already been awarded damages comprised of lost profits, the purpose of which was to make Aiken whole by placing it in the same position it would have been in had the contract not been breached. *Maxwell v. Schaefer,* 381 Pa. 13, 112 A.2d 69 (1955). See generally, Restatement of Contracts, § 329;

---

8. Since we are of the opinion that this item of damages was subsumed in the award of lost profits, and since the finding of a breach of a fiduciary duty was only necessary in order to support this award, we see no reason to pass upon the correctness of the finding of breach of duty.

5 Corbin on Contracts, § 992, Chap. 55. To allow Aiken to recoup also its expenses under the contract would be tantamount to a duplication of damages. See *Maxwell v. Schaefer, supra.* Mr. Wilson's salary was just such an expense and may not be the basis of an award based upon the same breach.[9]

In light of the foregoing, the subscribers to this opinion would vacate the decree of the court below insofar as it fixes the amount of damages which appellee has sustained, and remand the case to the court of common pleas so that the amount of damages due to the plaintiff may be recalculated in accordance with the views herein expressed. We would also permit trial court to take such additional evidence as may be deemed necessary or desirable for this purpose.

Mr. Chief Justice Eagen and Mr. Justice O'Brien join in this opinion.

---

9. It is true that the awards of damages were based upon two different theories—one a contractual breach, the other a breach of fiduciary duty—but nevertheless, both theories included the same actions on the part of Wilson. Having been awarded damages based upon the fiction that Wilson fulfilled his duty under the contract, appellees are precluded from receiving additional damages premised on the non-fulfillment of that same duty. See generally, *Myshko v. Galanti,* 453 Pa. 412, 309 A.2d 729 (1973).

Opinion in Support of Reversal

Justice Manderino

Although a covenant not to compete may be valid when given by a seller to the buyer of a business, it must be limited to preventing the use in competition with the buyer, of that which the seller has purportedly sold to the buyer. For example, the seller may be contractually prevented from competing by using the goodwill, reputation, or name of the business that has been sold if those items form a part of the consideration for the transaction. A covenant by which the seller is forbidden from transferring, by gift or loan, money or other property to anyone who might compete with the buyer is an illegal restraint of trade. Thus, if the covenant in this case specifically prohibited the seller from giving money to anyone he knew would use that money to finance a competitor of the buyer, it would be illegal. The covenant in this case does not prohibit such gifts however. Because Thomas Wilson's giving of gifts to his friends and former employees did not violate the covenant not to compete with appellee, I would reverse the order of the Court of Common Pleas.

The agreement between Wilson and appellee provided:

> "That Wilson may continue to devote an amount of time not to exceed the time now being spent by him to the affairs of those other businesses in which he is presently engaged."

The agreement also included a restraint of trade clause which read as follows:

> "Wilson recognizes that National is, and will in the future be, engaged in highly competitive businesses.

During the employment period, and for any subsequent period of employment by Aiken, *Wilson agrees that he will not, directly or indirectly, own, manage, operate, control, be employed by, participate in, or be connected in any manner, with the ownership, management, operation, or control of any business competitive with the business of National* within the continental United States or Canada. . . ." (emphasis added)

The opinion in support of affirmance concludes that this covenant is breached "if the covenanter knowingly engages in activity the necessary effect of which will be to *foster, if not instigate, competition.*" (Emphasis added). This conclusion is not only contrary to the express terms of the agreement, it also contradicts established case law both in this jurisdiction and elsewhere, and constitutes an illegal restraint of trade.

In *Harkinson's Appeal,* 78 Pa. 196 (1875), our court reversed the trial court's decree which held that the seller of a bakery and confectionery establishment violated her covenant not to engage, directly or indirectly, in the same business by establiishing her son in such a business without having any personal interest in that business herself. The seller in *Harkinson's Appeal,* like the seller in the instant case, had no intention of engaging in the new business and was in no way interested or involved in it. The seller in *Harkinson's Appeal* advanced money to her son knowing that the son would use that money to set up his own bakery and confectionery business which would compete with the buyer's establishment.

Similarly, in *Slate Co. v. Bikush,* 343 Mass. 172, 177 NE 2d 780 (1961), the sellers gave financial assistance to their son-in-law, who was engaged in the same kind of business and was in competition with the buyer. The sellers financial assistance consisted of being co-makers of a note so that their son-in-law could secure a loan to finance his business and by taking an assignment of accounts receivable to secure them against loss. The court held that these actions did not violate their agreement not to compete or to do anything to prejudice the goodwill sold, because the sellers made no use of their experience, had no ownership or operating interest in the competing business, gave no publicity to their extension of financial assistance, and because the seller's activity did not attract customers of the business sold to the son-in-law's business.

In *Thomas v. Thomas Truck and Caster Co.,* 228 N.W. 2d 52. (Iowa 1975), the court held that an agreement "not to engage as consultant or otherwise to any competitor" was not violated when the seller made gifts and loans to a son who used them in a business competing with that of the buyer. In *Buchingham Tool Corp. v. Evans,* 35 Mich. App. 74, 192 N.W. 2d 362 (1971), the court held that the seller of a tool and die business did not breach a covenant not to compete where the seller built a building to lease to his son for a tool and die business and guaranteed the lease of boring mills for his son, but did not participate in the operation of the business, did not have a financial interest in it, and did not counsel his son as to business matters. See also, *McKeighan Wachter Co. v. Swanson,* 138 Wash 682, 245 P10, aff'd on reh 141 Wash 694, 250 P.353 (1926); and *Gallup Electric Light Co. v. Pacific Improvement Co.,* 16 N.M. 86, 113 P848 (1911).

Our scope of review of a chancellor's findings of fact and of the conclusions of law and fact affirmed by the court en banc, is stated in *Van Products Co. v. General Welding and Fabricating Co.*, 419 Pa. 248, 257, 213 A.2d 769, 774 (1965):

> "It is fundamental that the findings of fact of a chancellor which are approved by the court en banc have the weight of a jury's verdict, and will not be disturbed on appeal if there is adequate evidence in the record to sustain the findings. *On the other hand, it is equally well established that the chancellor's conclusions, whether of law or fact, being no more than his reasoning from the underlying facts, are reviewable.*" (Emphasis added, citations omitted)

See also, *Felmlee v. Lockett*, 466 Pa. 1, 351 A.2d 273 (1976).

On the issue of whether the noncompetition covenant was breached, the chancellor concluded: "there can be no doubt that Wilson did indeed *participate in* and *was connected with* the establishment of a competing business." (Emphasis added.) This is a *conclusion* which must be reviewed in conjunction with the general rule as stated by this Court in *Hayes v. Altman*, 438 Pa. 451, 266 A.2d 269 (1970):

> ". . . because restrictive covenants are a partial restraint upon the free exercise of trade, we have frequently stated that *they should be strictly construed.*" (Emphasis added.)

In applying this standard, I conclude there was not sufficient evidence in the record for the chancellor's conclusion that the noncompetition covenant was breached.

The covenant, signed by Wilson, that he would not ". . . directly or indirectly, . . . *participate in* or *be connected in any manner* . . ." was limited by the clause *"with the ownership, management, operation* or *control* of any business competitive with the business of National . . ." (Emphasis added.) Even if we were to conclude, therefore, that the five transactions in question constituted a participation in or connection with a competing business, or, as stated by the majority, that they *fostered* competition it cannot be said that those activities dealt with "the ownership, management, operation or control" of a competitor.

It is, of course, undisputed that Wilson had no ownership interest in the new business, nor did he participate in its management, operation or control. He received no return from the business. I fail to see how the express terms of the agreement can be stretched to proscribe acts of generosity which incidentally turned out to increase Aiken's competition in business.

The opinion in support of affirmance states that it is irrelevant that these were gifts, motivated only by generosity, if their effect was to foster competition against Aiken. Such a view loses sight of the principles behind this area of law. The only legal justification in a century of case law allowing restrictive covenants ancillary to the sale of a business has been to keep the seller from retaining and using for his or her profit the goodwill—the name and reputation—which was purportedly sold.

Covenants not to compete have never been favored, and are valid only when they are related to either a contract for the sale of goodwill or to a contract for employment. *Piercing Pagoda, Inc. v. Hoffner,* 465 Pa. 500, 351 A.2d 207 (1976); *Maintenance Specialties v. Gottus,* 455 Pa. 327, 331, 314 A.2d 279, 281 (1974); *Jacobson & Co. v. International Environmental Corp.,* 427 Pa. 439, 235 A.2d 612 (1967); *Capital Bakers, Inc. v. Townsend,* 426 Pa. 188, 231 A.2d 292 (1967); *Barb-Lee Mobile Frame Co. v. Hoot,* 416 Pa. 222, 206 A.2d 59 (1965); *Morgan's Home Equipment Corp. v. Martucci,* 390 Pa. 618, 136 A.2d 838 (1957). See also Restatement of Contracts § 515(e) (1932). They are permitted not for the purpose of protecting a buyer against all competition, such would be against public policy. Rather, the law has caused an exception from its usual prohibition on restraint of trade, limited to the extent necessary to protect the buyer of the *goodwill* of a business.

> General covenants not to compete which are ancillary to the sale of a business serve a useful economic function; they protect the asset known as "good will" which the purchaser has bought. Indeed, in many businesses it is the name, reputation for service, reliability, and the trade secrets of the seller rather than the physical assets which constitute the inducements for a sale. *Morgan's Home Equip. Corp. v. Martucci,* 390 Pa. 618, 631, 136 A.2d 838, 846 (1957).

Thus it is indeed relevant that these were gifts to the former employees, gifts of money, rent or supplies gave Wilson no financial interest in the new business. Even more importantly they imparted to the new business no connection with the name, reputation, or reliability—the goodwill—which had attached itself to Mr. Wilson's former business.

Only if Wilson had taken some interest or return so as to associate his reputation, his name, or his services with the new business could he be said to have breached the covenant. Mere monetary gifts do not suggest Wilson's involvement in the enterprises any more than a bank loan would suggest that the bank was involved in the operation of the borrower's business.

Wilson often gave generous gifts to his friends and employees. The evidence overwhelmingly supports the conclusion that the gifts which caused the controversy at issue here were no more than expressions of gratitude conforming to a long-established pattern of generosity.

Wilson was a philanthropist who made large gifts to civic and charitable programs. When he sold his business to Aiken at the end of 1967, the agreement provided that Wilson would receive additional compensation for the sale dependent upon the profits of National for 1968 and 1969. After the first quarter of 1968, Wilson gave employees of Aiken, from his own pocket, the equivalent of one-half of the Aiken's profits for the first quarter of 1968, or approximately $54,000. Aiken regarded Wilson as paternalistic in his relations with his employees and complimented Wilson for making the gift. On another occasion Wilson had made a gift to one of his employees of about $25,000.00.

When Wilson was discussing the sale of his business to Aiken in 1967, he told the Chairman of the Board of Aiken, Mr. H. Norton Stevens, of his intentions toward National employees. Stevens testified that Wilson had wished to share a part of the purchase price of the

sale of National to Aiken, with some of his trusted employees. Apparently this was an expression of his gratitude for their efforts and as a reassurance to them that the sale would not affect their security at National. Stevens also admitted that in 1968, Wilson told him that he planned to make gifts to his employees, including Delo and Zebrovious, the new owners of Compacting Tools, Inc. Stevens also admitted that Wilson's "management style" involved not only giving gifts to his employees, but tailoring those gifts to the particular needs of the recipient. For example, Wilson maintained a farm for one employee, and for another provided special education.

Audrey Delo and Harry Zebrovious were longtime employees of Wilson. Delo had worked for Wilson since 1951, both at National and in Wilson's real estate development and leasing business. She was one of Wilson's key employees, and had served as his right arm in the business. Delo was also a close personal friend of Wilson, and had previously received numerous gifts from him including a diamond pendant, a horse, furnishings and improvements for her home, paid vacations and the use of Wilson's summer homes. Harry Zebrovious began working for Wilson at National in 1959 and had advanced from a machine operator to vice-president of National's operations.

In October of 1969, Wilson fell during a luncheon with Aiken executives and injured his head. Wilson remained seriously ill and was in and out of the hospital for a five-month period, being hospitalized for some seven weeks. He had three major and two minor operations. During this period Audrey Delo conducted Wilson's industrial development business.

In February and March 1970, Wilson made a gift to Delo of $30,000 and a gift to Zebrovious of $30,000.

These gifts gave Wilson no interest in the new business and did not link his name with it in any way. The gifts stand on no different footing than a loan to these persons from any other source, since any transaction which merely provides financing and no more, is an independent transaction unrelated to the formation of the business.

I also note that many of the activities complained of were naturally incident to Wilson's real estate business, which the covenant expressly *permitted* his to continue. That business involved the development and leasing of industrial and commercial real estate in three counties. Wilson's industrial parks housed about fifteen tenants, including competitors of the business sold to Aiken. Thus, his leasing of commercial property and furniture and his activities as landlord can hardly be said to be related to either Aiken's or Compacting's business. They were the primary functions of his real estate operation.

I find no breach of covenant in this case, and therefore would reverse the order of the trial court.

Opinion in Support of Reversal

Nix, J.

The opinion in support of affirmance prefaces its discussion of the alleged breach of the covenant not to compete by noting that the scope of review of the factual findings of the chancellor is limited. *Masciantonio Will,* 392 Pa. 362, 367, 141 A.2d 362, 365 (1968). I note at the outset that this reference is misleading in that the instant facts which allegedly constitute the breach are not in dispute. The only issue is the legal effect of Wilson's conduct. For this purpose, this Court clearly need not give deference to the legal conclusions of the chancellor. *See Snow v. Corsica Constr. Co., Inc.,* 459 Pa. 528, 329 A.2d 887 (1974); *Field v. Golden Triangle Broadcasting, Inc.,* 451 Pa. 410, 305 A.2d 689 (1973), *cert. denied,* 414 U.S. 1158 (1974); *Baldassarre v. Rare Metals Derivatives,* 444 Pa. 100, 282 A.2d 262 (1971); *Yuhas v. Schmidt,* 434 Pa. 447, 258 A.2d 616 (1969).

More importantly, it is my view that the facts in the instant case do not constitute a breach of the covenant not to compete. Contracts in restraint of trade should be strictly construed. *Hayes v. Altman,* 438 Pa. 451, 266 A.2d 269 (1970). Additionally, words in a contract are to be construed according to their common and ordinary meaning. *Pines Plaza Bowling, Inc. v. Rossview, Inc.,* 394 Pa. 124, 145 A.2d 672 (1958); *Connell v. Avon Garage,* 391 Pa. 189, 137 A.2d 765 (1958); Restatement, Contracts § 235(a). Applying these principles to the instant case, it becomes apparent that Wilson did not breach his contract with Aiken Industries. The language of the restrictive covenant reads as follows:

> "Wilson recognizes that National is, and will in the future be, engaged in highly competitive businesses. During the employment period, and for any subsequent period of employment by Aiken, Wilson agrees that he will not, directly or indirectly, own, manage, operate, control, be employed by, participate in, or be connected in any manner, with the ownership, management, operation or control of any business competitive with the business of National . . ."

The words "connected in any manner, with the ownership, management, operation or control" should be narrowly construed so as not to encompass the limitless range of activities that the interpretation of the opinion in support of affirmance would permit. The ordinary meaning of "management" as defined in Webster's Third New International Dictionary is the act of "direct[ing] or carry[ing] on business or affairs." Similarly, "operation" is defined as the "doing or performing of a practical work or of something involving practical application of principles or processes." The word "control" is defined as exercising a "restraining or directing influence over and to have power over." "Ownership" means having a "lawful claim or title."

Viewing Wilson's activities allegedly connected with Compacting Tooling, it appears that he gave money to two of Compacting's founders, Delo and Zebrovious. Wilson received no stock or securities in Compacting nor a position on the board of directors, nor office in the company in return for the money. He gained no right to participate in the business affairs of the company. Clearly, the gift of money from Wilson to Delo and Zebrovious, honoring a previous employment commit-

ment, does not qualify as being "connected with ownership, management, operation or control" of Compacting. Likewise, Wilson's leasing of rental property to Compacting, deferring the rent payment, and waiving the lessor's lien can only be characterized as activity pursuant to Wilson's real estate business, which Aiken expressly permitted Wilson to continue. Again, this activity gave Wilson no ownership interest in Compacting, nor any right to participate in the business of Compacting, nor a position of control. Finally, the covenant not to compete must be stretched to a ridiculous extent in order to find that Wilson's loan of office furniture and automobiles for several weeks constituted or contributed to a breach.

I would reverse the decree of the chancellor.

Opinion in Support of Reversal

Roberts, J.

In my view, the conduct of Thomas Wilson, appellant's testator, was not specifically proscribed by the language of the restrictive covenant.

Per Curiam Opinion

Per Curiam

The Court being equally divided with respect to the question of appellant's liability, the decree below is affirmed.

Each party to bear own costs.

Jones, former C.J., did not participate in the consideration or decision of this case.

Mr. Justice Pomeroy filed an opinion, joined by Mr. Chief Justice Eagen and Mr. Justice O'Brien, which would affirm the decree below insofar as it finds a breach of the covenant not to compete but would vacate the award insofar as it fixes the amount of damages and would remand for the recalculation of damages. Mr. Justice Roberts, Mr. Justice Nix and Mr. Justice Manderino filed separate opinions which would reverse the decree below on the grounds the non-competition agreement was not breached.

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1679

THE ESTATE OF THOMAS A. WILSON, EUGENE R. SPEER and THE UNION NATIONAL BANK OF PITTSBURGH, EXECUTORS,

Petitioners

v.

AIKEN INDUSTRIES, INC.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

GILBERT J. HELWIG
WALTER T. MCGOUGH
ROGER C. WIEGAND
ANTHONY J. BASINSKI
REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, Pennsylvania 15219

Counsel for Respondent,
Aiken Industries, Inc.

June, 1978

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

Table of Citations.

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1679

THE ESTATE OF THOMAS A. WILSON, EUGENE R. SPEER and THE UNION NATIONAL BANK OF PITTSBURGH, EXECUTORS,
Petitioners

v.

AIKEN INDUSTRIES, INC.,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

COUNTER-STATEMENT OF THE CASE

Petitioners here seek a writ of certiorari to the Supreme Court of Pennsylvania from a final decision of that court in an equity action brought by Aiken Industries, Inc. ("Respondent") against the Estate of Thomas A. Wilson and its Executor, the Union National Bank of Pittsburgh ("Petitioners").

The Pennsylvania trial court held that Petitioners' decedent had breached his contractual and fiduciary obligations to Respondent and awarded damages to Respondent in the amount of $193,576.75, which award was affirmed by a court en banc. Petitioners appealed that judgment to the Supreme Court of Pennsylvania, which on January 31, 1978, entered a per curiam order stating, "The Court being equally divided with respect to the

question of appellant's liability, the decree below is affirmed."

In addition to this order, three of the Justices of the Pennsylvania Supreme Court concurred in an opinion in which they would have affirmed as to liability but would have remanded for a recalculation of Respondent's damages. The remaining three Justices filed separate opinions indicating that they would have reversed on the question of liability.

On February 13, 1978, Petitioners filed an Application for Reargument with the Supreme Court of Pennsylvania, a copy of which is attached hereto as Appendix "A".[1] Petitioner's Application was based solely on three contentions:

1. Since no member of the Pennsylvania Supreme Court agreed in toto with the judgment of the lower court, there would be a "patent miscarriage of justice" if the Supreme Court of Pennsylvania did not rehear the appeal.

2. The various opinions indicated a conflict among the Justices on the scope of appellate review of a Pennsylvania equity adjudication which would result in "confusion as to the Pennsylvania law on the scope of appellate review"; and

3. The various opinions also indicated a divergence of opinion among the Justices on the law of restrictive covenants so that the lower Pennsylvania

---

1. Copies of the order of the Pennsylvania Supreme Court and the opinions of the individual Justices which were attached to that Application have been omitted herein because they are reproduced as an Appendix to the Petition for Writ of Certiorari.

Courts and the bar would be "without proper judicial guidelines on a legal question that recurs frequently."

Petitioners did *not* raise any Federal Constitutional or other Federal question in their Application for Reargument to the Supreme Court of Pennsylvania nor was any such raised or decided (or even involved) at any point in the Pennsylvania proceedings.

On April 11, 1978, the Supreme Court of Pennsylvania entered a per curiam order denying Petitioners' Application for Reargument, without opinion, a copy of which is attached hereto as Appendix "B".

Petitioners now seek a writ of certiorari to the Supreme Court of Pennsylvania claiming that its per curiam order of affirmance denied them due process.

REASONS FOR DENYING THE WRIT

I. There Was No Federal Constitutional Issue Involved, Raised Or Decided In The State Court Proceedings, Including Petitioners' Application For Reargument

This Court's decisions are clear that certiorari will not be granted where (as here) the alleged Federal question has not been previously raised or decided in the state court proceedings.

In *Cardinale v. Louisiana,* 394 U.S. 437, 22 L.Ed. 2d 398 (1969), this Court dismissed the writ of certiorari where it was determined at oral argument that the sole Federal question argued had never been raised or passed upon in the state court, stating:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Cromwell v. Randell,* 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee,* 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, *Miller v. Nicholls,* 4 Wheat. 311, 315 (1819), and since, e.g., *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.,* 360 U.S. 334, 342, n. 7 (1959); *State Farm Mutual Automobile Ins. Co. v. Duel,* 324 U.S. 154, 160-163 (1945); *McGoldrick v. Campagnie Generale Transatlantique,* 309 U.S. 430, 434-435 (1940); *Whitney v. California,* 274 U.S. 357, 362-363 (1927); *Dewey v. Des Moines,* 173 U.S. 193, 197-201 (1899); *Murdock v. City of Memphis,* 20 Wall. 590 (1987)." *Id.* at 438, 22 L.Ed. 2d at 400.[2]

This undeviating rule has included cases involving allegations of due process violation. *Moore v. Illinois,* 408 U.S. 786, 799, 33 L.Ed. 2d 706, 716 (1972).

In *Bolln v. Nebraska,* 176 U.S. 83, 91, 44 L.Ed. 382, 385 (1900), this Court unequivocally expressed this principle:

> "We have repeatedly decided that an appeal to the jurisdiction of this Court must not be a mere afterthought, and that if any right, privilege, or immunity is asserted under the Constitution or laws of the United States it must be specifically set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained."

Ordinarily, the raising of a Federal question in a petition for rehearing in the state courts is itself too late to confer jurisdiction on this Court. *Rooker v. Fidelity Trust Co.,* 261 U.S. 114, 67 L.Ed. 556 (1923). *Mergenthaler Linotype Co. v. Davis,* 251 U.S. 256, 64 L.Ed. 255

---

2. The cases cited reflect that this Court has consistently interpreted the statutes governing its jurisdiction over final judgments of state courts, from section 25 of the Judiciary Act of 1789, 1 Stat. 85 to the present 28 U.S.C. § 1257, as requiring that a Federal question be timely raised in the state courts.

(1920); *Simmerman v. Nebraska,* 116 U.S. 54, 29 L.Ed. 535 (1885); *Lagrange v. Chouteau,* 4 Pet. 287, 7 L.Ed. 861 (1830).

This Court has on occasion recognized an exception where the Federal question arose from some unanticipated ruling of the state court and the petition for rehearing presented the first opportunity to raise the issue. *Herndon v. Georgia,* 295 U.S. 441, 79 L.Ed. 1530 (1935); *Great Northern Railway Co. v. Sunburst Oil Co.,* 287 U.S. 358, 77 L.Ed. 360 (1932).

However, Petitioners did not even raise a Federal issue in their Application for Reargument following the Pennsylvania Supreme Court's per curiam affirmance based upon the divided views of the Justices of that court. Thus, they cannot come within the exception, because as this Court said in *Beck v. Washington,* 369 U.S. 541, 553-4, 8 L.Ed. 2d 98, 109 (1962):

> "Assuming *arguendo* that for the purpose of our jurisdiction the question would have been timely if raised in a petition for rehearing, not having been raised there or elsewhere or actually decided . . ., the argument cannot be entertained here under an unbroken line of precedent. E.g., *Ferguson v. Georgia,* 365 U.S. 570, 572 (1961); *Capital City Dairy Co. v. Ohio,* 183 U.S. 238, 248 (1902)."

Even assuming that Petitioners had raised a Federal question in their Application for Reargument, the denial of that application by the Pennsylvania Supreme Court *without* opinion precludes any grant of certiorari here. *Hanson v. Denckla,* 357 U.S. 235, 243-4, 2 L.Ed. 2d 1283, 1291-2 (1958); *Citizens Nat. Bank of Cincinnati v. Durr,* 257 U.S. 99, 66 L.Ed. 149 (1921); *Jett Bros. Distilling Co. v. Carrollton,* 252 U.S. 1, 64 L.Ed. 421 (1920); *Bilby v. Stewart,* 246 U.S. 255, 62 L.Ed. 701 (1918).

An alleged Federal issue here is a "mere afterthought", as in *Bolln, supra.*

II. Assuming Arguendo That A Federal Question Had Been Properly Raised And Decided In The State Proceedings, Affirmance By An Equally Divided Court Does Not Violate Due Process

The Pennsylvania Supreme Court affirmed the decision of the lower court because it was equally divided on the issue of liability. Under such circumstances, it is the universal rule that the decision of the lower court must be affirmed. 5 Am. Jur. 2d, Appeal and Error, § 902 at 338 (1962). Certainly such affirmance does not constitute a "miscarriage of justice" as contended by Petitioners—let alone a denial of Federal due process.

Indeed, this Court itself on numerous occasions has affirmed decisions by an equally-divided Court. See e.g., *Ohio ex rel. Eaton v. Price,* 364 U.S. 263, 4 L.Ed.2d 1708 (1960); *Etting v. Bank of the United States,* 11 Wheat, 59, 6 L.Ed. 419 (1826); *The Antelope,* 10 Wheat. 66, 6 L.Ed. 268 (1825). Such an affirmance also has long been held to be without precedential effect. *Ohio ex rel. Eaton v. Price,* 364 U.S. 263, 264, 4 L.Ed. 2d 1708, 1709 (1960).

The rationale and effect of this rule of affirmance was early set forth by this Court in *Durant v. Essex Co.,* 7 Wall. 107, 112, 19 L.Ed. 154, 157 (1869):

> "If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a

judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgement. *The legal effect would be the same if the appeal, or writ of error, were dismissed.*"[3] (emphasis added)

See also *Neil v. Biggers,* 409 U.S. 188, 34 L.Ed.2d 401 (1972).

Petitioners are not aided by the fact that the six Justices of the Pennsylvania Supreme Court chose to express their views by way of opinions. The effect of an affirmance by the equal decision of the court is the same as if the court had dismissed the appeal. *Durant, supra.* Those opinions are merely the expressions of the individual Justices who authored or joined in them and do not reflect any action by the court as a court. When members of this Court have expressed their views in separate opinions where the Court affirmed because it was divided, it has been acknowledged that "such an expression is unnecessary where nothing is settled." *Price, supra* at 264, 4 L.Ed.2d at 1709.

Finally, this matter is not the sort which warrants the granting of a writ of certiorari since it does not in-

3. The Pennsylvania Supreme Court has taken the same position with regards to the effect of an equal division in that Court. As stated in the leading Pennsylvania case on point, *First Congressional Dist. Election,* 295 Pa. 1, 12-13, 144 Atl. 735, 739 (1928) : "It is a universal rule that when a judicial or semi-judicial body is equally divided, the subject matter with which it is dealing must remain in statu quo." See also *Creamer v. Twelve Common Pleas Judges,* 443 Pa. 484, 489, 281 A.2d 57, 58 (1971).

volve "principles the settlement of which is of importance to the public as distinguished from that of the parties, . . . " *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393, 67 L.Ed. 712, 714 (1923). See also *Rea v. Sioux City Cemetery,* 349 U.S. 70, 79, 99 L.Ed. 897, 904 (1955).

Here the issues are of importance only to the Petitioners who are dissatisfied with the outcome of the state court proceedings and there is no conflict of opinion and authority on the effect of affirmance by a divided court.

THE PETITION SHOULD BE DENIED

There is no Constitutional or other Federal issue here involved—none was raised in, or decided, by the Pennsylvania courts even on Petitioners' Application for Reargument or in the Pennsylvania Supreme Court's per curiam denial thereof.

Respondents respectfully submit that the Petition for Writ of Certiorari should be denied, at the cost of Petitioners.

Respectfully submitted,

GILBERT J. HELWIG
WALTER T. MCGOUGH
ROGER C. WIEGAND
ANTHONY J. BASINSKI

Counsel for Respondent,
Aiken Industries, Inc.

REED SMITH SHAW & MCCLAY
747 Union Trust Building
Pittsburgh, PA 15219

APPENDIX "A"

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

AIKEN INDUSTRIES, INC.,
Appellee,
v.
THE ESTATE OF THOMAS A. WILSON, EUGENE R. SPEER AND THE UNION NATIONAL BANK OF PITTSBURGH, EXECUTORS,
Appellants

No. 79
MARCH TERM,
1974

APPLICATION FOR REARGUMENT

RALPH H. GERMAN
WILLIAM S. SMITH
COOPER, GERMAN, KELLY & SMITH
2232 Oliver Building
Pittsburgh, Pennsylvania 15222

Attorneys for Applicants-
Appellants

APPLICATION FOR REARGUMENT

TO THE HONORABLE, THE JUSTICES OF
THE SUPREME COURT OF PENNSYLVANIA:

This Application for Reargument is based on three contentions:

1. Appellants appealed the lower court decision both as to liability and as to damages. Three Justices (Mr. Justices Roberts, Nix and Manderino) agreed with Appellants that there was no liability. Three Justices (Mr. Chief Justice Eagen and Mr. Justices Pomeroy and O'Brien) affirmed the liability portion of the lower court decision but agreed with Appellants that the lower court had applied an improper measure of damages. *Thus, the entire Court (former Mr. Chief Justice Jones did not participate) agreed that the lower court award should be vacated but incomprehensibly the Per Curiam Opinion affirmed the decree of the lower court.* If reargument is not granted, there is a patent miscarriage of justice.

2. The four opinions on liability indicate a substantial conflict of opinion among the Justices on the scope of appellate review of an equity adjudication. Three Justices were of the opinion that a limited review was appropriate and three Justices felt that the chancellor's conclusions were subject to general review. If this case is not reargued to the end that a majority opinion may eventuate, there will be confusion as to the Pennsylvania law on the scope of appellate review.

3. The four opinions on liability indicate a substantial divergence of opinion among the Justices on the law of restrictive covenants in Pennsylvania so that the

lower courts and the bar are without proper judicial guidelines on a legal question that recurs frequently. It is respectfully submitted that the matter warrants reconsideration by the entire Court so that either the opinions by Mr. Justice Nix and by Mr. Justice Manderino or the opinion by Mr. Justice Pomeroy will become the settled law of Pennsylvania.

I. PRELIMINARY STATEMENT

The lower court entered a decree against Appellants in the amount of $196,576.75.

Appellants appealed on the basis that there had been no breach of the restrictive covenant and alternatively, even if there had been, the lower court applied an improper measure of damages.

Mr. Justice Pomeroy wrote an Opinion In Support of Affirmance and Modification joined in by Mr. Chief Justice Eagen and Mr. Justice O'Brien (hereinafter "Pomeroy Opinion"). The Pomeroy Opinion found liability but would vacate the lower court decree so that damages could be recalculated in accordance with the views in the Pomeroy Opinion. The Pomeroy Opinion found duplication of damages in the lower court award and additionally determined that damages should have been based on net profits and not on gross profits.

The Opinions In Support Of Reversal of Mr. Justice Manderino, of Mr. Justice Nix and of Mr. Justice Roberts did not touch on damages since they found no liability.

II. REASONS RELIED ON THE ALLOWANCE OF REARGUMENT

A. The Per Curiam Opinion (Appendix "B" hereto) affirms the decree below on the basis that the Court was equally divided on the question of liability. The Per Curiam Opinion overlooks the fact that all six Justices who participated in the decision were of the opinion that the decree of the court below should be vacated although for different reasons. Because the Justices were equally divided on liability is no reason to affirm a lower court decree with which each of the six Justices disagreed. Appellants are in the intolerable position of having to pay a lower court award when Mr. Justices Manderino, Nix and Roberts are of the opinion that Appellants are not liable at all, and Mr. Chief Justice Eagen and Mr. Justices O'Brien and Pomeroy are of the opinion that the lower court improperly calculated the amount of damages. In the present posture, Appellants would have been infinitely better off if Mr. Justices Manderino, Nix and Roberts would have joined in the Pomeroy Opinion against Appellants rather than filing opinions in favor of Appellants. The mere statement of the proposition is indicative of its incongruity.

B. The Pomeroy Opinion (Appendix "F" hereto), unlike the opinion by Mr. Justice Manderino (hereinafter the "Manderino Opinion") and the opinion by Mr. Justice Nix (hereinafter the "Nix Opinion"), found that there was substantial evidence to support the lower court's findings and that the lower court's finding of fact, if supported by adequate evidence, would not be disturbed on appeal.

The Pomeroy Opinion, it is respectfully submitted, overlooks the point that there was no dispute with respect to the material facts in this case and that the appeal was from the chancellor's conclusions which, whether of law or fact, are no more than his reasoning from the underlying facts. The Manderino Opinion (Appendix "E" hereto), citing *Van Products Co. v. General Welding and Fabricating Co.*, 419 Pa. 248, 257, 213 A.2d 769, 774 (1965), found that the chancellor's conclusions were reviewable. The Nix Opinion (Appendix "D" hereto) held that this Court need not give deference to the legal conclusions of the chancellor.

Thus, three Justices made a limited review of the conclusions below and three Justices, those who found no liability, made a complete review.

The Pomeroy Opinion on the scope of review is contrary to *Van Products, supra,* and to *Felmlee v. Lockett,* 466 Pa. 1, 351 A.2d 273 (1976) cited in the Manderino Opinion; the *Felmlee* case opinion was by former Mr. Chief Justice Jones who did not participate in the consideration or decision of this case.

The scope of review question is obviously critical. If this Court is now saying that there should be only a limited review of the chancellor's conclusions (as distinguished from his findings of fact), there will in the future be few successful appeals from equity adjudications. If this Court is now modifying the rule in *Van Products, supra,* it should be done by the full Court and not by three Justices. Unless this case is reargued so that a majority opinion may resolve this conflict among the Justices, the Pennsylvania law on the scope of appellate review of an equity decision is most uncertain.

C. The four liability opinions indicate a fundamental conflict among the Justices as to the law of restrictive covenants. The Opinion In Support Of Reversal by Mr. Justice Roberts, the Manderino Opinion and the Nix Opinion restated the familiar principle of law that contracts in restraint of trade should be strictly construed and that any conduct not specifically proscribed by the restrictive covenant language is not violative of the covenant. The Pomeroy Opinion, without citing a single case on liability, concluded that "the covenant is breached if the covenantor knowingly engages in activity the necessary effect of which will be to foster, if not instigate, competition."; there is no judicial precedent for such a far-reaching and novel statement. The Pomeroy Opinion ignores the hitherto well-settled rule of law that a non-competition covenant is violated only if the covenantor engages in conduct which is forbidden by the non-competition covenant.

The Pomeroy Opinion in effect holds that it makes no difference whether a non-competition covenant is broad or narrow and that it makes no difference what specific types of conduct are proscribed by the covenant. If the covenantor engages in *any* activity which fosters competition he is in violation of his covenant, no matter what the covenant says. This holding may create substantial problems for the Court in future cases.

III. CONCLUSION

It is most unsatisfactory for the litigants, the lower courts, the bar and businessmen in the Commonwealth to have the important issues raised by this appeal dangling. The only practicable solution is to have the appeal reargued so that a majority opinion may resolve these issues.

Respectfully submitted,

COOPER, GERMAN, KELLY & SMITH
By RALPH H. GERMAN
By WILLIAM S. SMITH
2232 Oliver Building
Pittsburgh, Pennsylvania 15222

Attorneys for Applicants-
Appellants

APPENDIX "B"

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

SALLY MRVOS
Prothonotary
IRMA T. GARDNER
Deputy Prothonotary

801 City-County Building
Pittsburgh, Pa. 15219
April 17, 1978

Ralph H. German, Esquire
William S. Smith, Esquire
Cooper, German, Kelly & Smith
2232 Oliver Bldg.
Pittsburgh, Pa. 15222

In Re: Aiken Industries, Inc. v. The Estate of Thomas A. Wilson, et al, Appellants
No. 79 March Term, 1974

Gentlemen:

The Court has entered the following Order on your Application For Reargument, in the above matter:

"Petition denied this 11th day of April, 1978.

Per Curiam"

Very truly yours,

IRMA T. GARDNER
Deputy Prothonotary

ITG:ban
cc: Walter T. McGough, Esquire
Reed Smith Shaw & McClay
747 Union Trust Bldg.
Pittsburgh, Pa. 15219